SUPREME COURT, U.S.
FILED

011509 APR - 8 2002

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CHRISTY LYNETTE HOLLAND SEITZ,
Petitioner,

v.

WILLIAM SPEAGLE, and
wife, DERENE SPEAGLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether a state violates a mother's constitutionally protected right to custody of her daughter when it uses a "best interests of the child" analysis to deny the mother custody in favor of a non-parent third-party by finding the mother unfit based solely on past conduct that no longer exists proved only by a preponderance of the evidence?

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****

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

Petitioner, Christy Lynette Holland Seitz [hereinafter Christy], respectfully prays that a writ of certiorari issue to review the attached opinion of the Supreme Court of North Carolina, filed on 18 December 2001 [App. 1-14], upon which the judgment of the Supreme Court of North Carolina was entered on 7 January 2002.[1] [App. 49-50] This opinion is starkly at odds with the consistent jurisprudence of this Court endorsing the constitutionally protected right of a mother to the care, custody, and nurturing of her child that is superior to a non-parent, third party where the

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[1] The opinion of the Supreme Court of North Carolina was filed on 18 December 2001. The actual judgment is entered on the docket by the clerk 20 days after the filing of the opinion. N.C. R. App. P. 32(b).

mother has not been legitimately determined unfit to raise her daughter. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1082); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is published at 354 N.C. 525, 557 S.E.2d 83 (2001). [App. 1-15] The court below denied a petition for rehearing on 31 January 2002.[2] [App. 47-48] The opinion of the North Carolina Court of Appeals, which was reversed by the court below, is published at 141 N.C. App. 534, 541 S.E.2d 188 (2000). [App. 15-20]

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on 7 January 2002. [App. 49-50] The petition is from a final judgment of the Supreme Court of North Carolina. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as the state has denied petitioner her right and privilege to the care, custody, and control of her daughter over a non-parent, third party, which is protected by due process.

CONSTITUTIONAL AMENDMENT INVOLVED

U.S. Const., amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

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[2] In North Carolina, unlike the federal system, *see* Fed. R. App. P. 41(d)(1), the filing of a petition for rehearing in an appellate court has no effect of the date a judgment is entered on the docket. N.C. R. App. P. 31(e).

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

On 3 September 1993 petitioner, Christy Seitz gave birth to her daughter, Amber, who is the subject of this custody litigation. Christy was not married to Amber's father, Stacey Speagle. After two years during which Christy and Stacey lived together, separated, reconciled, and separated again, Stacey filed an action seeking custody on 8 September 1995, just after Amber's second birthday. On 17 October 1995, a temporary custody order was entered under which Christy was to have custody of Amber for fourteen days and Stacey was to have custody of Amber for fourteen days.

On 29 January 1996, Bryce Delon murdered Stacey and then killed himself. Christy was arrested on January 29 and charged with conspiring to have Stacey killed. The following day, respondents filed a complaint seeking permanent custody of Amber. An emergency order was entered granting custody of Amber to respondents. Christy duly filed an answer to the custody complaint. She was eventually released on bond pending trial on the conspiracy charge and sought to regain custody of Amber. Her motion for temporary custody was denied on 2 May 1996. After Stacey's death, his original custody action abated. Following a jury trial at which she testified, Christy was acquitted of the homicide charge on 27 June 1997. On 19 August 1997, she was granted visitation rights with Amber pending the final outcome of the custody proceedings.

The custody trial began on 11 August 1998 and concluded on 4 September 1998. The trial court announced its oral decision on September 4, awarding custody to respondents but granting "liberal visitation"

to Christy. In doing so, the trial court stated, "But I do want to be certain that there is no finding that [Christy] is unfit for custody." [App. 46] The trial court noted that there may have been conditions in the past "but not in the recent past" that might be construed as inconsistent with the presumption that the biological parent will always act in the best interests of the child. He concluded that "those things are not in the recent past and I do not want any finding that she is unfit for custody." [App. 46]

The court subsequently entered a written order that awarded respondents custody and visitation to Christy. The court found Christy's "lifestyle and romantic involvement's [sic] resulted in her neglect and separation from the minor child." [App. 34] The court also found "any actions in the past but not recent past by [Christy] that may have been construed as inconsistent with the presumption that the biological parent will act always in the best interests of the child do not render [her] unfit to have a relationship with, but not custody of, her daughter." [App. 34] The court concluded respondents "are fit and proper persons to be granted the care, custody and control" of Amber and the "best interests of the child" would be served by granting them custody. [App. 34] The court further concluded Christy "is unfit to have custody of, but is a fit and proper person to be granted visitation with, the minor child." [App. 34]

Christy appealed to the North Carolina Court of Appeals. In a unanimous decision, the court reversed. The court concluded the trial court improperly utilized "a best interests of the child" standard to resolve the custody dispute because Christy "had not lost her constitutionally protected right to retain custody of her child." [App. 20] Significantly, the court of appeals

recognized (1) the constitutional right of a natural parent to raise her child prevents application of the "best interests of the child" test in determining a custody dispute with a third party and (2) no evidence or findings of fact supported the conclusion that Christy had engaged in behavior that justified stripping her of her constitutional rights as a parent.

Respondents sought and obtained review in the Supreme Court of North Carolina. Explaining that this Court has never held that a parent's constitutional right to the custody of her child was absolute [App. 8],[3] the lower court determined it was appropriate to consider

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[3] For this proposition, the state supreme court relied on *Lehr v. Robertson*, 463 U.S. 248 (1983). The use of *Lehr* is curious, especially in light of more numerous and analogous precedents endorsing the constitutionally protected right of a natural parent to the care and custody of her child, including *Troxel*, *Santosky*, and *Stanley*. In *Lehr*, a father with no significant custodial, personal, or financial relationship to a child he fathered out of wedlock challenged the child's adoption when she was two years old by the child's mother and her husband, whom she married eight months after the child's birth. *Id.* at 251-52. This Court took especial note of the absence of any effort by the father to be any part of the child's life in the two years since her birth, as "he did not seek to establish a legal tie until after she was two years old." *Id.* at 262. Having made these determinations, this Court concluded that since the father failed to "grasp the opportunity" to establish a relationship with or "accept some measure of responsibility for" the child, "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262. A fair reading of *Lehr* reveals it hardly stands for an overarching limitation on a parent's constitutional right to the custody of her child. Indeed, its facts are so diametrically unlike those in this case that is can hardly be considered authoritative. The lower court reliance on it alone for its federal constitutional guidance, to the exclusion of far more similar situations in *Troxel*, *Santosky*, and *Stanley*, is a startling demonstration of the inadequacy and incorrectness of the decision below and the need for certiorari review.

past conduct that no longer existed, and which never had an impact (negative or otherwise) on the child, as a factor in the custody analysis. [App. 13] It therefore reversed the court of appeals and reinstated the trial court's order.

Christy sought rehearing, arguing that the state supreme court had misapplied the appropriate constitutional inquiry and erred in holding that past conduct, which was no longer occurring, could be used to award custody to a non-parent, third party as opposed to the natural parent.[4] Rehearing was denied on 31 January 2002. [App. 47-48] The lower court's judgment was entered on 7 January 2002. [App. 49-50]

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[4] In North Carolina, a petition to rehear an appellate decision can only be filed and obtained if it is supported by certificates from two attorney who have been members of the bar for at least five years who are neither counsel to the parties nor have a personal interest in the proceedings. N.C. R. App. 31(a). They "must have carefully examined the appeal and the authorities cited in the decision [and] consider the decision in error on points specifically and concisely identified." *Id.* Christy supported her petition for rehearing in the state supreme court with affidavits from two of the most recognized and respected professors of family law in North Carolina: Suzanne Reynolds of Wake Forest Law School (the current author of Lee on North Carolina Family Law, the seminal treatise on family law in the state) and Jean Cary of Campbell Law School (who also teaches family law at Duke Law School). Both Professor Reynolds and Professor Cary found the state supreme court decision erroneous in its use of the "best interests of the child" standard in a custody dispute between a mother and a non-parent and in its consideration of the mother's past behavior which was no longer occurring as a determinative factor. Their views strongly signal the need for review by this Court.

B. FACTUAL BACKGROUND.

Christy [then Holland] Seitz met Stacey Speagle in high school in 1990-91, and they began dating. After high school, Stacey left for basic training, returned about four months later, and began staying with Christy at her apartment in Hickory. Christy and Stacey were 18.

Although respondents, Stacey's parents, disapproved of the intimate relationship, they preferred that Christy and Stacey stay with them rather than at an apartment. In December 1992, Christy and Stacey became engaged and Christy became pregnant with Stacey's child. Respondents were angry about the pregnancy and wanted Christy to have an abortion. Christy, however, wanted to keep the child. So she continued the pregnancy, moved from respondents' house, and lived with her mother. Several months later, Christy returned to live with respondents and worked at an office supply store until shortly before the child's birth.

Amber was born on 3 September 1994. Christy stayed with her own mother for several weeks, and then Christy and Stacey lived with respondents. Christy stayed home and took care of Amber. After numerous disagreements with respondents over how to raise Amber, Christy left with her mother, and eventually moved into an apartment. Christy and Stacey reconciled until August when Christy and Stacey again separated. Christy earned her GED and moved to Raleigh. Christy stayed in Raleigh until March 1995, when she returned to Hickory so Amber could be closer to her father.

While living in Raleigh, Christy worked as a topless dancer. When Christy worked in Raleigh, either Allison Barber Griffin or Christy's older sister, Brandi, looked after Amber. Allison, who lived with Christy and Amber in Raleigh and Hickory, testified for respondents that Christy was a good mother. Allison had no misgivings about Christy watching Alexis, Allison's young daughter.

No evidence suggested Amber was not well looked after during this time. In fact, when asked by respondents' about activities with Amber, Allison replied they took their children to the park, worked on crafts, and went on trips to the mountains.

From November 1994 until December 1995, Christy held similar jobs dancing at various clubs. Several witnesses, including Heather Brown and Allison Griffin, explained Christy danced because she could make good money and still have time to be with Amber. Stacy Speagle had no objection to Christy's dancing.

In March 1995, Christy moved back to Hickory because the cost of living was lower, and she and Amber could be closer to Stacey. Christy lived with Allison Griffin and Allison's daughter. Allison said Christy had no male visitors who spent the night during the time they lived in Raleigh or Hickory.

Christy earned enough to support herself and Amber and had time during the day to spend time with Amber. Christy and Amber would practice the alphabet, do flash cards, and watch shows such as Sesame Street. When Christy worked in Hickory, Amber would spend the night either with her grandparents or with Roberta Jewell, a child-care-provider with experience running day care facilities. Sometimes Amber would spend the entire night, and sometimes Christy would pick her up early in the

morning after work. Jewell testified Christy appeared to love Amber, and that Amber was always clean, well fed, and well dressed. Nothing indicated Christy did not take good care of Amber.

In early September 1995, Christy began to move to the Carolina Beach area, where her mother and step-father lived. However, Stacey filed suit seeking custody. In October 1995, a judge awarded Stacey custody approximately half of the time, with Christy and Stacey to alternate custody every two weeks. At this point Christy abandoned her plan to move and returned to Hickory. During times when Christy had custody of Amber, she would take Amber to visit with her mother at the beach.

During one of these trips, Christy met Bryce Delon, a marine stationed at Camp Lejeune. They became friends, and the trial court found they engaged in sex at the marine barracks. Amber was never present; in fact, Christy only visited the barracks when Stacey had custody of Amber.

In November 1995, Christy's sister Brandi moved to Texas. In December 1995, Christy and Delon went to Texas to visit Brandi. During this trip, Amber was in Hickory with Stacey. In Texas, Christy danced one evening at a club; that was the last time she danced. She returned from Texas without Delon, began work in the hat-check area of a club, and made plans to earn her living through child care.

Jimmy Morris, a private investigator hired by respondents, saw Christy working at the hat-check area of a club in early January 1996. Christy told him she and Stacey were getting along, she felt better about Stacey having access to Amber, and she was thinking of finding work with children. Morris never saw any sign that Christy mistreated Amber.

Derene Speagle testified that when Christy brought Amber to them she was clean. Respondents offered no evidence Christy mistreated Amber in any way.

During January 1996, Delon and some friends visited Christy. Delon lured Corporal Robert Lankford to Hickory with the idea that Lankford could meet Christy's friend, Heather. In fact, this was not true, and Lankford saw Heather for about five minutes and then spent time in Christy's residence. During this time, Christy and Bryce went into the kitchen to talk and smoke, and Lankford watched videos with Amber. In addition, Lankford, Delon, Christy and Amber went out on various errands. They took Amber sledding in the back yard. Amber was not mistreated in any way. Lankford said he and Delon spent the night at a hotel. In addition, Lankford thought Christy was not happy Delon had come and did not seem to like him. Lankford did not see affection between them. Sometime after this visit, Christy and Stacey reconciled, and Stacey moved back into Christy's apartment.

After Stacey and Christy reconciled, Delon again came to visit, accompanied by a Marine named Varney. Heather Brown came to visit Christy during at this time, and saw Delon and Varney at the residence. When Heather opened the door to a bathroom, outside the presence of Christy, Delon made a comment about harming Stacey. Christy did not hear the comment. When Christy asked Heather what Delon said, Heather repeated the comment, and then said that Delon was just being silly. Heather also claimed that while the custody action between Christy and Stacey was pending, Christy said Stacey would be dead by Christmas and that she had set it up. Heather thought Christy was joking and did not take the comment

seriously. Heather did not recall any further discussion during Delon's visit in January 1996, although she was at Christy's apartment for two hours. Like Christy, Heather supported herself by dancing at topless clubs, and it did not interfere with her ability to be a good mother. Heather said Christy was a good mother to Amber. Amber was clean and well fed.

On 29 January 1996, Delon drove to Hickory, shot and killed Stacey Speagle, and then shot and killed himself. Delon had told several people he wanted to hurt Stacey, but they did not believe him or take him seriously because of his penchant for lying.

Following Stacey's murder and Delon's suicide, Christy was arrested and charged with having arranged the murder. Christy was held in jail and respondents obtained an ex parte emergency order the day after her arrest granting them custody of Amber. On 27 March 1996, Christy was released on bond and immediately sought custody of her daughter, which was denied pending resolution of the criminal charge.

Christy moved to Dallas and lived with her sister, Brandi, pending the trial. Through her sister, Christy met Eric Seitz, a Dallas businessman who was involved in developing shopping centers. Seitz had assisted Brandi in bailing Christy out of jail, and she eventually worked as his secretary. They began dating and became engaged prior to her trial.

From the time Christy was arrested through her trial, she consistently attempted to maintain contact with her daughter. Denied custody by the court, she nonetheless called to speak to Amber. Respondents, however, refused to allow Christy to talk to Amber. Christy sent numerous letters to Amber, which respondents would not read to her. Christy sent

Amber presents. Christy also sent approximately $5,000.00 in child support, much of which respondents did not accept.

After a jury trial, at which she testified, Christy was acquitted of participating in Stacey's murder. On 19 August 1997, the court granted Christy visitation rights with her daughter, which visits were to be accomplished by having Amber delivered and picked up from a neutral exchange person. For the first time in almost twenty months, Christy was allowed to have contact with her own daughter. Although exercising her visitation required extensive travel, Christy visited Amber on every occasion she could, until her ability to travel was restricted by a pregnancy with her second child. The only visit Christy missed was caused when the respondents refused to deliver Amber to the neutral exchange person.

Christy married Eric Seitz in October 1997. They got married in North Carolina so that Amber could participate in the wedding. The every-second-weekend visits required Christy and her husband to come North Carolina and find a place to stay. Christy arranged to stay in the home of Barbara Andrews. Andrews described Christy as a loving mother and a very loving wife. Andrews described the activities she saw when Christy and her husband would visit with Amber. They played and hugged, and interacted in a loving fashion.

After this visitation began, Christy and Eric contacted a psychologist about issues that would arise in reunifying with a child after an extended separation. In addition, Christy and Eric enrolled in a parenting class called Blended Families.

Respondents consulted with a psychologist after the visits began between Amber and Christy. This psychologist worked with Amber and respondents to

reduce the stress from these visits. He instructed Derene Speagle not to question Amber about her visits with Christy, but acknowledged a tape she made ignoring this advice. She was recorded telling Amber the court made her send Amber to Christy, statements the expert would not encourage a care taker to make.

Another clinical psychologist with whom Christy had consulted since June 1996 offered some insight into why Christy had made some poor life choices when she was younger. In her expert opinion, Christy had improved in her decision-making and would not return to the lifestyle she had before Stacey's death.

Christy testified about her home in Texas. Their neighborhood has a playground, a club house, and other children. An accountant testified Seitz had the financial resources to support a family.

Manner In Which The Federal Constitutional Issue Was Raised And Decided Below

Petitioner, Christy Seitz, sought to regain custody of her daughter from respondents, which she lost, through no fault of her own, upon her arrest for a crime for which she was later acquitted. In the ensuing custody trial, Christy presented substantial evidence of her fitness and argued her constitutionally protected status as Amber's mother created a presumption in her favor and required a finding that she was unfit by something more than a mere preponderance of the evidence. To the contrary, the trial court used a "best interests of the child" analysis, evaluating the evidence through a preponderance of the evidence standard, and awarded custody to respondents, the paternal grandparents, without affording Christy her constitutionally protected status as Amber's mother

because it did so without finding Christy was not a fit parent. Indeed, it found she was a fit parent. [App. 46] The North Carolina Court of Appeals reversed, holding a parent's constitutional right to custody of a child precludes the use of a "best interests of the child" analysis unless evidence shows the parent is unfit because she endangers the health or safety of her child. [App. 18-19, relying on *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972)] That court noted no evidence or findings of fact supported a conclusion that Christy ever engaged in any behavior which "had any negative impact on" Amber, resulted in Amber's neglect or abandonment, or even "had a substantial risk of causing some harm to her." [App. 20] The Supreme Court of North Carolina reversed this decision, finding the constitutionally protected right of a parent is not absolute [App. 8, relying on *Lehr v. Robertson*, 463 U.S. 248 (1983)] and does not preclude the use of a "best interests of the child" analysis, which need only be proved by a preponderance of the evidence.[5] [App. 13] Whether Christy's due process right to the care, custody, and nurturing of Amber gave her a presumptive right to

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[5] Curiously, no court below considered this Court's most recent explanation and analysis of a parent's constitutional right to the care, custody, and nurturing of her child, especially vis-a-vis a non-parent, third-party, in *Troxel v. Granville*, 530 U.S. 57, 66-72 (2000)(plurality opinion)(holding parent has constitutionally protected interest in care, custody, and control of child that state can neither supply nor hinder absent evidence parent did not adequately care for child). Indeed, given the implications *Troxel* has for this situation and the lower court's apparent disregard of its impact, this Court should remand this matter for reconsideration in light of *Troxel*. *Mason v. City of Biloxi*, 385 U.S. 370 (1966)(summarily reversing in light of earlier decision); *Torrance v. Callenius*, 369 U.S. 658 (1962)(remanding for consideration in light of new decision).

custody over the non-parent respondents that could only be overcome through a showing, by at least clear and convincing evidence, that Christy was unfit was raised and decided on the merits below.

REASONS WHY CERTIORARI SHOULD BE GRANTED

THE COURT BELOW VIOLATED A MOTHER'S DUE PROCESS RIGHT TO THE CUSTODY OF HER DAUGHTER WHEN IT USED A "BEST INTERESTS OF THE CHILD" ANALYSIS TO DENY HER CUSTODY IN FAVOR OF A THIRD PARTY BY FINDING HER UNFIT BASED SOLELY ON PAST, DISTANT CONDUCT FOUND ONLY BY A PREPONDERANCE OF THE EVIDENCE.

The decision below is wholly at odds with the consistent jurisprudence of this Court endorsing the constitutionally protected right of a mother to the custody of her daughter that is superior to a non-parent, third party, like respondents, where the mother has not been legitimately determined unfit to raise her daughter. The state court of appeals cogently observed, "there are no findings of fact or any evidence in the record [petitioner's] conduct had any negative impact on [the child] or had a substantial risk of causing some harm to her." [App. 20] "The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This Court had earlier reaffirmed its historical recognition of a natural parent's fundamental liberty interest in the custody of her child even when she has not been a

model parent or may have lost temporary custody of her child. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). *Santosky* explained that a parent is a least entitled to a clear and convincing evidence standard of proof before a child can be removed from her custody in favor of a third person. *Id.* The court below failed to heed these teachings. It did not accord Christy Seitz her constitutionally protected liberty interest in the custody of her child, Amber, particularly in a dispute with respondents, who were non-parent, third parties. By employing the "best interests of the child" analysis, the court below reduced a natural parent to same status as a non-parent, third party. This Court's jurisprudence, culminating most recently in *Troxel*, does not permit this result. Not surprisingly, the decision below is at odds with the majority of the highest courts in other states on the question.[6] *See, e.g., In re Parenting of J.N.P.*, 305 Mont. 351, 27 P.3d 953 (2001)(standard requires showing sufficient to terminate parental rights); *In re Guardianship of L.L.*, 745 N.E.2d 222 (Ind. App. 2001)(must show "present

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[6] The lower court also allowed the custody determination to be made only by a preponderance of the evidence standard. [App. 13] When the dispute is between a natural parent and a non-parent, third party, this lower threshold of proof is inconsistent with the parent's constitutional right to custody. *Santosky*, 455 U.S. at 753 (requiring proof by clear and convincing evidence before denying natural parent custody in favor of third person). The lower court's use of this burden of proof is also contrary to the majority of the highest courts in other states on this question. *See, e.g., In re Guardianship of LL*, 745 N.E.2d 222 (Ind. App. 2001)(requiring proof by "clear and cogent" evidence); *Greer v. Alexander*, 248 Mich. App. 259, 639 N.W.2d 39 (2001)(requiring clear and convincing evidence); *Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989)(requiring clear and convincing evidence in reliance on *Santosky*).

unfitness" or "past abandonment"); *Hamers v. Guttormson*, 610 N.E.3d 758 (N.D. 2000)(only go to "best interests" analysis in "exceptional circumstances like voluntary abandonment); *In re Adoption of a Female Child*, 896 S.W.2d 546 (Tenn. 1995)(only use "best interests" standard if evidence of substantial harm to child). For these reasons, certiorari is appropriate to address this important constitutional question.

A. Due Process Protected Christy Seitz's Right to the Custody of Her Daughter, Which the Courts Below Denied.

There can be no serious dispute that Christy Seitz, as a natural parent, enjoys a constitutionally protected right to the custody of her child, Amber. The courts must carefully protect parental rights, not merely as a matter of legislative grace, but as a matter of constitutional law. *Stanley*, 405 U.S. at 651. As *Stanley* explained, the integrity of the family unit is protected by due process, equal protection, and the ninth amendment. *Id.* (citations omitted). Most recently, this Court decided a visitation dispute between a child's natural mother and the paternal grandparents, which provided important guidance that the lower court ignored. In *Troxel*, the paternal grandparents sought to obtain more frequent visitation with the child than the child's mother wished to offer them. 530 U.S. at 60-61. The lower court had declared a state visitation statute unconstitutional because it permitted the state to infringe upon the natural parents right to raise her child without a threshold showing of harm and permitted judicial overriding of parental decisions regarding visitation merely because a trial

court felt a different decision better would serve the child's best interest. *Id.* at 63. This Court affirmed the reversal of the order granting the grandparents visitation that exceeded what the child's mother had offered. "In light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66. (plurality opinion). In reaching this conclusion, this Court described the state visitation statute at issue as "breathtakingly broad" because it gave a parent's decision regarding appropriate visitation for her child no deference and permitted "a court [to] disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67. The statute violated the mother's fundamental right to make decisions regarding her child's up bringing.

Importantly, *Troxel* recognized that there is a presumption that a fit parent acts in the best interests of her child. *Id.* at 68. "[O]ur constitutional system long ago rejected any notion that a child is the merely creature of the State and, on the contrary, asserted that parents generally have the right coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decision. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v.*

J.R., 442 U.S. 584, 602 (1979). As *Troxel* cogently concluded, "so long as a parent adequately cares for his or her children (i.e. is fit), there would normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 69. The lower court simply did not afford Christy this constitutional protection.

In many ways, the decision below represents a judicial interference with parent decision-making just as "breathtakingly broad" as the legislative interference in *Troxel*. Here, a mother sought to regain custody, which she had lost through no fault of her own (again, quite unlike the situation in *Lehr*, where the complaining parent had taken nary a single step to involve himself in the two-year old child's life), from a non-parent, third party. The trial judge denied her request, as in *Troxel*, "based solely on the judge's determination of the child's best interests." He did so without any finding or evidence that the mother neglected or did not adequately care for the child. And the state supreme court affirmed this result despite a unanimous decision of the intermediate appellate court that the mother did nothing to lose her constitutionally protected right to retain custody of her child and that this principle prevented the application of the "best interests of the child" test in a dispute between a parent and a third party. [App. 18-20] In essence, North Carolina does by judicial fiat what this Court prohibits by legislative decree.

A fair reading of the opinions below leads to the inescapable conclusion that the trial court denied Christy custody of Amber, and the court below agreed with that determination, almost exclusively because of

a disapproval of Christy's past conduct, none of which had any effect on her child. However one may regard a mother's decision to work as a topless dancer and engage in romantic and perhaps sexual activity with several men (all outside the child's presence and none of which left the child abandoned, not cared for. or neglected), this past conduct does not justify denying the mother custody of the child in favor of a non-parent, third party. The intermediate appellate court specifically noted there was no evidence or findings of fact that would support a conclusion that Christy engaged in behavior which would justify stripping her of her right as a parent. [App. 18] There was no proof Christy engaged in any behavior detrimental to Amber or which had a substantial risk (or even any risk) of causing some harm to her. [App. 20] Because of its basic disapproval of some parts of Christy's lifestyle (all of which ended long before the custody trial and which an expert testified would never resume), the trial court imposed its own judgment of what was in Amber's "best interests" in awarding custody to respondents. As this Court noted in *Troxell*, this subjective approach through the use of "best interests of the child" standard essentially placed a burden on Christy, the mother, of disproving that custody for respondents would be in the best interest of Amber. This decisional framework failed to provide Christy with the protection for her fundamental constitutional right to the custody of Amber. 530 U.S. at 69. The result here is simply inconsistent with *Troxell* and must be reversed.

B. **The Lower Court's Use of a Preponderance of the Evidence Standard Unconstitutionally Shifted the Burden of Proof to the Natural Parent/Mother and Away from a Third Party.**

In this case, North Carolina announced, for the first time, that a non-parent, third party need only show by a preponderance of the evidence that it would be in a child's best interests for custody to reside elsewhere than with the natural parent. [App. 13] In *Santosky*, this Court held that such a low standard of proof by preponderance of the evidence was unconstitutional in determining a contest between a natural parent and the state. 455 U.S. at 768-70. In doing so, this Court noted that the overwhelming majority of the states required a higher standard of proof then merely a preponderance of the evidence in such situations. *Id.* at 749-50 & n.3.[7] A parent has a fundamental, basic, and constitutionally protected right to raise her own daughter and any third person who attacks this custody and seeks to abrogate this right, including paternal grandparents like respondents, show the natural parent's unfitness by at least clear and convincing evidence. *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989)(relying on *Santosky* and *Stanley*).

The vice in using a lower standard of proof by preponderance of the evidence is it essentially shifts the burden of proof to the natural parent and, in doing so, ignores the constitutionally recognized presumption that a natural parent acts in the best interest of her child.

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[7] North Carolina was not included in the discussion or listing. It appears the decision below is the first reported opinion in North Carolina setting the burden of proof in a custody dispute between a natural parent and a non-parent, third party.

See Heltzel v. Heltzel, 248 Mich. App. 1, 638 N.W.2d 123 (2001)(requiring mother to show her child's "best interests" required custody with the mother rather than grandparents violated mother's fundamental liberty interest). If a natural parent's decision becomes subject to judicial review, *Troxell* acknowledges that her view must be accorded some special weight. 530 U.S. at 70. Neither the trial court nor the state supreme court accorded Christy's opinion any special weight. And apparently both courts did so primarily, if not exclusively, because of disagreements with her decision to engage in lawful employment as a topless dancer and to have romantic relationships with men to whom she was not married. As *Greer* explained, the presumption that it is always in the best interests of a child to be in the custody of her natural parent remains a presumption of the strongest order and must be seriously considered and heavily weighted in favor of the parent. 248 Mich. App. at 267, 639 N.W.2d at 43 (quoting *Deel v. Deel*, 113 Mich. App. 556, 562, 317 N.W.2d 685 (1982)).

In addition to *Troxell*, *Stanley* also recognized the interest of a parent in the custody of her child that "undeniably warrants deference, and absent a powerful countervailing interest, protection." 405 U.S. at 651. This fundamental right is expressed through the well-recognized presumption that the right of a natural parent to the custody of her child is superior to any right or interest claimed by a third-person. *In re Adoption of E.L.*, 315 Ill. App. 3d 137, 157, 733 N.E.2d 846, 862 (2000). While the presumption is not absolute, it serves as one of the more important factors used by a court in deciding where custody should be. In order to retain custody of a child over the superior right of a natural parent, a third party must demonstrate good cause or

reason to overcome this presumption. *Id.* at 158, 733 N.E.2d at 862. The court below acted contrary to the rule in the majority of states, based upon constitutional underpinnings, "that when a parent initiates an action to obtain custody, a nonparent seeking to retain custody must bear the burden of overcoming the parent's presumptively superior right to custody." *In re Guardianship of L.L.*, 745 N.E.2d 222, 227 (Ind. App. 2001). Evidence to rebut the presumption in favor of custody in the natural parent must be clear and cogent. *Id.* at 228; *accord Overfield v. Collins*, 199 W.Va. 27, 36, 483 S.E.2d 27, 36 (1997); *Hendrickson v. Binkley*, 316 N.E.2d 376, 381 (Ind. App. 1975). *In re Guardianship* is particularly instructive and shows why the decision below is at odds with the constitutional holdings of this Court and the majority rule among the states. A child had been placed in the guardianship of a third party because the mother and her ex-husband were drug and alcohol abusers and fought regularly. The mother rehabilitated herself, both from her drug and alcohol abuse and from her relationship with the former spouse who fought with her. The conditions that led to the guardianship "where no longer present when [the mother] filed the current petition to terminate guardianship." The trial court left the guardianship in place. This decision was reversed because the trial court did not apply the appropriate presumption, similar to the error in the case at bar. Furthermore, the trial court also relied on past conduct that no longer existed to deny custody to the parent in favor of a third party, again like the courts below. This reliance was misplaced. Reliance on past conduct is inappropriate in light of *Troxell*. Rather, a third party must "prove [a parent's] unfitness at the present time, not at some time in the past." *Id.* at 231.

Critically, none of the courts that reviewed this matter - - the trial court, the court of appeals, or the state supreme court - - found that Christy's work as a topless dancer or her romantic involvements with other men existed at the time of the trial court's custody determination. Indeed, the uncontroverted evidence demonstrated she was happily married and working as a secretary in her husband's real estate development enterprise. Had the trial court imposed on respondents the constitutionally required burden of proving Christy's unfitness by clear and convincing evidence, they could not have met this burden and the trial court could not have denied Christy custody of Amber. Indeed, if it had done so, the decision could not stand.

North Carolina's use of a preponderance of the evidence standard in this situation, where a third party seeks to retain custody of a child over the natural parent, is unconstitutional. *Santosky*, 455 U.S. at 769-70. It is far outside the mainstream of the rules used in other jurisdictions. As the Michigan Court of Appeals observed, due process does not permit a state "to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Accordingly, it is not sufficient in a competing custody claim between a noncustodial natural parent and a third party that the third party establish by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the child were maintained by him. *Heltzel v. Heltzel*, 248 Mich. App. 1, 28, 638 N.W.2d 123, 138-39 (2001). This Court should grant certiorari to review this important constitutional issue.

C. No Evidence Showed Christy Seitz was an Unfit Parent.

There was no evidence, much less clear and convincing evidence, that Christy Seitz was not fit to have custody of Amber. *Troxell* noted the importance of this aspect "for there is a presumption that fit parents act in the best interests of their children." 530 U.S. at 68. Justice O'Connor, writing for the plurality in *Troxell,* went on to explain the basic notion of a fit parent. A parent is fit if she "adequately cares for . . . her children." *Id.* This Court's recognition of fitness is significant. Nothing in the record suggested Christy did not adequately care for Amber. [App. 16] Rather, all of the evidence showed Christy provided more than adequate care for Amber. Allison Barber, who lived with Christy and Amber in Raleigh and Hickory, testified for respondents that Christy was a good mother. Allison had no misgivings about Christy watching her own young daughter. When asked by respondents about activities with Amber, Allison replied they took their children to the park, worked on crafts, and went on trips to the mountains. When Christy worked in Hickory, Amber would spend the night either with her grandparents or with Roberta Jewell, a child-care provider with experience running day care facilities. Sometimes Amber would spend the entire night, and sometimes Christy would pick her up early in the morning after work. Jewell testified Christy appeared to love Amber, and that Amber was always clean, well fed, and well dressed. Nothing indicated Christy did not take good care of Amber. Jimmy Morris, a private investigator hired by respondents, never saw any sign that Christy mistreated Amber. Even Derene Speagle testified that when Christy

brought Amber to them she was clean. Respondents offered no evidence Christy mistreated Amber in any way.

Relying loosely on the relative fitness of a third party vis-a-vis a natural parent carries a constitutionally unacceptable risk that the resulting custody analysis will impermissibly lower the burden a third party should shoulder to obtain custody from a natural parent. *See Hamers v. Guttormson*, 610 N.W.2d 758 (N.D. 2000)(unfitness must mean more than poor parenting choices); *In re S.B.L.*, 150 Vt. 294, 553 A.2d 1078 (1988)(due process requires showing natural parent unfit in dispute with third party and "best interests" standard is not appropriate). In a contest between a parent and a non-parent, a parent cannot be deprived of the custody of her child unless there has been a finding, after notice required by due process, that she has caused or a least created a risk of substantial harm to the child. Only then may a court engage in a "best interests of the child" evaluation in determining custody. *In re Adoption of a Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995).

Both the trial court's convoluted musings at the end of the custody trial, its less than clear order, and the state supreme court decision lead to the inescapable conclusion that Christy was denied custody of Amber almost exclusively because of a disapproval of Christy's past conduct, none of which had any effect whatsoever on Amber. However one may regard a mother's work as a topless dancer and romantic involvement with several men (all outside the Amber's presence and none of which left her abandoned or neglected), it cannot justify denying Christy custody of Amber in favor of the non-parent, third party respondents. The intermediate appellate court specifically noted there was no evidence or findings of fact that would support a conclusion that

Christy engaged in behavior which would justify stripping her of her right as a parent. [App. 18] There was no proof Christy engaged in any behavior detrimental to Amber or which had a substantial risk (or even any risk) of causing some harm to her. [App. 20] Because of a basic disapproval of some parts of Christy's lifestyle (all of which ended long before the custody trial and which an expert testified would never resume), the trial judge imposed its own judgment of what was in Amber's "best interests" in awarding custody to respondents and the state supreme court simply followed suit. As this Court noted in *Troxell*, this subjective approach through the use of "best interests of the child" standard essentially placed a burden on Christy, the mother, of disproving that custody for respondents would be in the best interest of Amber. This decisional framework failed to provide Christy with the protection for her fundamental constitutional right to the custody of Amber. 530 U.S. at 69. The result here is flatly outside acceptable constitutional constraints.

It is clear the lower courts simply exercised their judgment in determining whether Christy or respondents would be better parents of Amber. However, the constitutional strictures preclude this discretionary determination. The lower courts were not free simply to decide it would be in Amber's best interest to be with respondents. *Troxell* makes this abundantly clear. To the extent the lower courts did so because of a disagreement with or disapproval of Christy's past conduct, which all the evidence showed no longer continued, this discretionary determination in utter disregard of Christy's constitutionally protected rights as Amber's mother is simply indefensible. This Court should grant certiorari.

CONCLUSION

For the reasons stated herein, Christy Lynette Holland Seitz respectfully requests that the judgment of the Supreme Court of North Carolina be summarily reversed or vacated and remanded for reconsideration in light of *Troxell v. Granville*, 530 U.S. 57 (2000). In the alternative, she respectfully requests that a writ of certiorari issue to review the decision below.

RESPECTFULLY submitted this the 8th day of April 2002.

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IN THE SUPREME COURT OF NORTH CAROLINA
No. 32PA01

FILED: 18 DECEMBER 2001
[Entered: December 18, 2001]

WILLIAM SPEAGLE, and wife, DERENE SPEAGLE

v.

CHRISTY LYNETTE HOLLAND SEITZ

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 141 N.C. App. 534, 541 S.E.2d 188 (2000), reversing an order and judgment entered 5 April 1999 by Creech, J., in District Court, Catawba County. Heard in the Supreme Court 11 September 2001.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Stephen L. Palmer; and Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., for plaintiff-appellants.

Ruldolf Maher Widenhouse & Fialko, by Thomas K. Maher, for defendant-appellee.

LAKE, Chief Justice.

The question presented for review in this case is whether the trial court was correct in determining defendant lost her constitutionally protected status as a parent and in applying the "best interests of the child" analysis under the circumstances in this case. The Court of Appeals reversed the trial court, holding there was no evidence of "conduct inconsistent" with

defendant's protected status at the time of trial or at any time soon before trial, which would support triggering of the "best interest" analysis. *Speagle v. Seitz*, 141 N.C. App. 534, 537 n.1, 541 S.E.2d 188, 190 n.1 (2000).

On 1 March 2001, this Court allowed defendant's motion to dismiss plaintiffs' appeal of a constitutional question, but allowed plaintiffs' petition for discretionary review. For the reasons stated below, we reverse the decision of the Court of Appeals and direct that court to reinstate the trial court's judgment awarding custody of the child to plaintiffs.

On 3 September 1993, defendant, Christy Lynette Holland (now Christy Seitz), gave birth to a daughter, Amber Ashton Holland, out of wedlock. The biological father of the child was William Stacy Speagle. Starting soon after the child's birth, defendant and the child often moved from one location to another. Defendant and the minor child resided with plaintiffs, William Speagle and Derene Speagle, and the father from about 1 October 1993 until shortly after Christmas in December 1993. Plaintiffs are the parents of Stacy Speagle and the paternal grandparents of the child.

Defendant was employed as a topless dancer at various establishments in North Carolina from 1993 through 1995. Defendant was fired from one such establishment in June 1995 in Hickory, North Carolina, for violating its rules by ejaculating a male patron in front of the audience.

During the early part of 1994, defendant and the infant child resided with defendant's mother and stepfather. During this period, defendant denied that Stacy Speagle was the biological father of the child.

However, a paternity test confirmed he was the biological father. Defendant and her daughter moved to a townhouse in the Bethlehem community of Alexander County, North Carolina, in January or February 1994. Plaintiffs and the child's father visited the child at this location. Defendant and the child moved to Raleigh in October 1994. In March 1995, they moved back to Hickory, North Carolina. After her return to Hickory in 1995, defendant danced at another establishment in Hickory at various times throughout the year. While defendant worked, she left her child in the care of a woman previously warned by the Catawba County Department of Social Services for keeping too many children in her house. Defendant occasionally picked the child up at 1:00 or 2:00 a.m. from this residence.

Defendant and the father reconciled several times after the child's birth. After a period of reconciliation in the summer of 1995, they soon separated again. Defendant did not allow the father to see his child after this separation. The father filed two separate actions in Catawba County, seeking custody and legitimation of the minor child. On 12 December 1995, the trial court entered a temporary custody order providing joint custody to defendant and the father. The custody case was set for trial commencing at the 21 February 1996 session of court.

In September 1995, defendant moved to Carolina Beach, North Carolina, with the child in her custody. From September 1995 until November 1995, defendant worked part-time as a topless dancer in Snead's Ferry, North Carolina. During this period, she had a relationship with Bryce Delon, a marine stationed nearby at Camp Lejeune. On weekends,

defendant and her sister, Brandy Holland, would spend the night on the base with Delon and his roommate, Heath Mosely. On occasion, defendant engaged in sexual intercourse with Delon, and her sister engaged in sexual intercourse with Mosely during these weekends.

Defendant had sole custody of the child from the time of her birth until 12 December 1995, when the trial court entered an order granting joint custody to defendant and the father. During the times defendant and the father were not reconciled and he had custody of the minor child, both father and child resided with plaintiffs.

In December 1995, defendant traveled with Delon to Texas to meet his family. On 18 January 1996, defendant and Stacy Speagle again reconciled and began living together in defendant's home in Hickory. After this reconciliation, Delon visited defendant at her residence in Hickory.

On 29 January 1996, Delon shot and killed Stacy Speagle. Later that evening, Delon committed suicide. On 30 January 1996, defendant was arrested and charged with the first-degree murder of Speagle and conspiracy to commit first-degree murder. On the day of defendant's arrest, plaintiffs filed a complaint seeking permanent custody of the child as well as an *ex parte* order for temporary custody. The District Court, Catawba County, immediately entered an emergency order granting plaintiffs custody of the child. Defendant remained in jail until 26 March 1996, when she was released on bond. After being released on bond, defendant moved to Dallas, Texas, and lived with her sister, Brandy Holland. She later established her own residence there and worked as an office receptionist.

On 29 March 1996, defendant filed an answer to plaintiffs' complaint and counterclaimed for custody. On 2 May 1996, the trial court denied defendant's motion for temporary custody. The court allowed plaintiffs' motion to stay further proceedings either until the completion of defendant's trial for Speagle's murder or the district attorney, the State Bureau of Investigation and the Hickory Police Department "decid[e] to share all information which plaintiffs' counsel considers adequate to present the case of the plaintiffs at a custody proceeding." On 29 June 1997, after a six-week trial, defendant was acquitted of all charges relating to the murder of Speagle. In October 1997, defendant married Eric Seitz in Texas, and in June 1998, she gave birth to a second child.

In the case *sub judice*, the trial court found as a fact that defendant's "lifestyle and romantic involvements" resulted in her "neglect and separation from the minor child" and concluded that defendant was unfit to have custody of the child. The trial court found as a fact and concluded as a matter of law that, at the time of the hearing, it was in the best interests of the child for custody to remain with plaintiffs. Defendant was awarded visitation with the child.

The trial court further found defendant's conduct to be inconsistent with her constitutionally protected interest as set forth in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). In *Petersen*, this Court held that natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children. Absent a showing of unfitness or neglect, this interest must prevail in a custody dispute between a parent and a nonparent. *Id.* at 403-04, 445 S.E.2d at 905.

In addition, the trial court made several findings of fact regarding plaintiffs and their relationship with the minor child. The trial court found plaintiffs presented ample testimony of their love for the child and their ability to provide for her care and upbringing. Plaintiffs had good character and reputations, with a stable life in a comfortable, well-kept home in Hickory, North Carolina. The child was well adjusted; was enrolled in a nearby school; and had a strong bond with plaintiff, Derene Speagle. Shortly after the child began visitation with defendant, plaintiffs sought professional assistance from a child psychologist to assist the child with those visits. The trial court found that since the child's birth, plaintiffs and the child had a close and loving relationship, the continuation of which was necessary to protect the child's best interests and welfare.

Defendant appealed the trial court's decision to the Court of Appeals, contending there was insufficient evidence to support the trial court's finding that defendant lost her constitutionally protected right to custody. The Court of Appeals agreed, and based on *Petersen*, it reversed the trial court's ruling and awarded custody of the child to defendant. *Speagle*, 141 N.C. App. at 537-38, 541 S.E.2d at 190. The Court of Appeals held there existed "no evidence [d]efendant was engaging in any 'conduct inconsistent' with her protected status in August 1998, the date of the custody trial, or any time soon before that trial." *Id.* at 537 n.1, 541 S.E.2d at 190 n.1. The Court of Appeals thus concluded that defendant did not lose her constitutionally protected status. *Id.* at 537, 541 S.E.2d at 190. Therefore, the court reasoned that it was improper for the trial court to apply the best interests analysis. *Id.*

In the appeal to the Court of Appeals, plaintiffs asserted a cross-assignment of error addressing the trial court's failure to admit and consider evidence of defendant's participation in the murder. This cross-assignment was not addressed by the Court of Appeals. In their petition for discretionary review by this Court, plaintiffs included this issue that the Court of Appeals failed to address. On 1 March 2001, this Court allowed plaintiffs' petition for discretionary review with no limitations.

Plaintiffs now argue that the trial court's findings of fact of defendant's neglect and separation from the child and that defendant's conduct was inconsistent with her protected status were supported by the evidence, and the trial court's conclusions of law based thereon were correct. Additionally, plaintiffs assert that while the trial court reached the correct result, the court erred in excluding evidence of defendant's participation in Speagle's murder. Plaintiffs contend that in light of defendant's overall conduct and under these circumstances, the Court of Appeals erred in concluding defendant did not lose her constitutionally protected status. Specifically, plaintiffs assert that the evidence of defendant's involvement in Speagle's murder was relevant and should have been allowed and incorporated into the trial court's determination. Plaintiffs contend defendant's participation in the murder of the child's father could be proven by a preponderance of the evidence, and such proof, in and of itself, would abrogate her constitutional right to custody. Plaintiffs contend the murder evidence and trial court's findings of fact regarding defendant's conduct

inconsistent with her protected status, based upon her lifestyle, strongly support the trial court's award of custody to plaintiffs.

The United States Supreme Court has recognized that protection of a parent's interest in the custody of his or her children is not absolute. *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983). This principle is stated by this Court in *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997). Like the present case, *Price* also involved a custody dispute between a parent and a third party who was not the natural parent. In *Price*, this Court set forth a test for determining when a parent loses his or her protected status and the "best interest of the child" analysis is triggered, holding as follows:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. *Lehr*, 463 U.S. 248, 77 L. Ed. 2d 614; *In re Hughes*, 254 N.C. 434, 119 S.E.2d 189 [(1961)]. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of

> the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, *see* N.C.G.S. § 7A-289.32 (1995), would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. *Other types of conduct*, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Price, 346 N.C. at 79, 484 S.E.2d at 534-35 (emphasis added) (citations omitted); *see also Adams v. Tessener*, 354 N.C. 57, 61-62, 500 S.E.2d 499, 502 (2001). We reaffirm the holding in *Price*.

As mentioned above, plaintiffs contend the trial court erred in excluding relevant evidence of defendant's participation in the murder. Not withstanding plaintiffs' assignments of error and arguments in this regard, the Court of Appeals did not specifically address the relevancy of the murder evidence.

While we do not consider the evidence relating to the murder to be essential to our determination of the instant case, in light of the circumstances here presented, we elect to address the issue of the relevancy of this type of evidence in custody proceedings, as this was one of the main contentions of the parties in both the trial court and the Court of Appeals, and we consider this issue important in the development of our law in custody proceedings.

In addition, we do not agree with the inference contained in the Court of Appeals' opinion that custody proceedings, unlike termination of parental rights proceedings, cannot or should not be concerned with past circumstances or past actions and conduct of a parent when determining custody as between parents or between parents and nonparents. We conclude that any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding. In this regard, we note that findings of fact of a parent's conduct inconsistent with that parent's protected status, whether related to past or present conduct, do not in and of themselves determine custody. A finding of inconsistent conduct merely triggers the best interests of the child analysis.

We now turn to whether the evidence of defendant's participation in Speagle's murder was relevant and constituted "conduct inconsistent" with her protected status. While the trial court did not expressly state this evidence was not relevant, it is clear from the record that the trial court did not consider this evidence when determining custody. The court noted

defendant had been tried and acquitted of all charges in the Speagle murder and stated that evidence of defendant's role in the murder had "nothing to do with what is before this Court today." We disagree with the trial court's ruling regarding the relevancy and thus the admissibility of this evidence.

We find the logic and authority set forth in a prominent case from California to be compelling. The court there held: "As a matter of case law, as well as common sense, the question of whether one parent has actually murdered the other is about as relevant as it is possible to imagine in any case involving whether the surviving parent should be allowed any form of child custody." *Simpson v. Brown*, 67 Cal. App. 4th 914, 925-26, 79 Cal. Rptr. 2d 389, 395 (1998). The relevance of this type of evidence in child custody cases is clear, and such evidence is paramount.

Other areas of North Carolina law find such evidence highly relevant. For example, the "slayer" statute, N.C.G.S. § 31A-4 (1999), prevents a murderer from acquiring the testate or intestate property of a decedent he willfully and unlawfully killed. Likewise, the principle that a person may not benefit from his or her own wrong prevents a parent from sharing in the wrongful death proceeds in an action brought by the child's estate, based upon the parent's negligence. *Carver v. Carver*, 310 N.C. 669, 675, 314 S.E.2d 739, 744 (1984); *see* 2 James B. McLaughlin, Jr. & Richard T. Bowser, *Wiggins: Wills and Administration of Estates in North Carolina* § 203 (4th ed. 2000). It would be incongruous for evidence of a party's participation in a murder to be relevant in property and estate cases but not be relevant in child custody cases where one parent is accused of killing the other parent.

The trial court excluded testimony previously given by Robert Varney in defendant's criminal trial. That testimony tended to show that in December 1995, Bryce Delon approached Varney and asked him to kill Speagle while Delon was on military leave. Delon apparently wanted to kill Speagle because of his custody battle with defendant. Varney also testified in the murder trial that on 27 January 1996, two days prior to the murder, he traveled with Delon to Hickory to visit defendant at the home she was sharing with Stacy Speagle. During the evening of 27 January 1996, a woman named Heather Brown came to defendant's residence. According to Varney's testimony, Delon hid in the bathroom with a .45-caliber pistol in hand until he realized it was Brown. Delon then stated to Brown, "You almost got f---ing shot." Varney testified this incident occurred while the child was in the residence. During the trip, Delon told Varney that "he [Delon] was going to have Christy [defendant] send him [Stacy Speagle] to a Food Lion and he was going to pop him in the parking lot." Speagle was in fact murdered by Delon in a Food Lion parking lot. Delon murdered Speagle with a .45-caliber pistol. All of this evidence was excluded in the custody trial.

The trial court did consider testimony by Brown regarding a statement made by defendant concerning the victim. Brown testified that in December 1995, defendant stated to Brown that "Stacy Speagle would be dead by Christmas and it was taken care of." Speagle was murdered by Delon on 29 January 1996, one month after Christmas.

The California Court of Appeals dealt with a similar situation in *Hightower v. Smith*, 147 Cal. App. 2d 686, 306 P.2d 86 (1956). In that case, the mother's paramour was convicted of murdering the child's father. At the time of the murder, the child's father was married to the child's mother. The mother was indicted, tried and acquitted of the father's murder. The mother sought custody of her child over the child's paternal aunt. The trial court considered all evidence and denied custody to the mother. *Id.* at 687, 306 P.2d at 86. The California Court of Appeals affirmed the trial court. *Id.* at 703, 306 P.2d at 98.

In this case, defendant was acquitted of all criminal charges relating to the murder. The standard of proof in a criminal trial is proof of guilt beyond a reasonable doubt. However, the applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence. *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 733, 325 S.E.2d 237, 241 (1985). Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. Although defendant was acquitted in the criminal trial, evidence of her involvement in the murder of the child's father was highly relevant in the subsequent custody case and could possibly have been proven using the lower standard. Thus, the trial court should have considered all relevant, admissible evidence relating to defendant's role in Speagle's murder.

Defendant argued Varney's testimony was inadmissible hearsay, regardless of relevancy. Plaintiffs contended the evidence fell within the Rule 804(b)(1) hearsay exception as former testimony admissible where the declarant at a later trial is unavailable as a witness. The trial court did not find

this evidence inadmissable as hearsay, and the Court of Appeals did not address the issue. We decline to address this issue as well because we conclude a new trial is not required in this case.

In light of the evidence before and considered by the trial court, we conclude the trial court was correct in its finding of fact that defendant's conduct "resulted in her neglect and separation from the minor child," and in accord with our holding in *Price*, we further conclude the trial court was correct in holding, in effect, that defendant's actions were inconsistent with her protected status, and in applying the "best interest of the child" analysis, that defendant was unfit to have custody. The decision of the Court of Appeals is therefore reversed and that court is directed to reinstate the order and judgment of the trial court.

REVERSED.

Justice EDMUNDS did not participate in the consideration or decision of this case.

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000
[Entered: December 29, 2000]

WILLIAM SPEAGLE, and wife
DERENE SPEAGLE,

Plaintiffs,

v. NO. COA99-1526

CHRISTY LYNETTE HOLLAND SEITZ,

Defendant.

Appeal by plaintiffs and defendant from order and judgment filed 5 April 1999 by Judge William A. Creech
in Catawba County District Court. Heard in the Court of Appeals 17 October 2000.

Sigmon, Clark, Mackie, Hutton & Hanvey, P.A., by Forrest A. Ferrell and Stephen L. Palmer, for plaintiff-appellants/appellees.

Rudolf Maher Widenhouse & Fialko, by Thomas K. Maher and M. Gordon Widenhouse, for defendant-appellant/appellee.

GREENE, Judge.

Christy Lynette Holland Seitz (Defendant) appeals a 5 April 1999 Order and Judgment (the Order) awarding William Speagle and Derene Speagle (collectively, Plaintiffs) custody of Defendant's daughter, Amber Ashton Holland (Amber), with liberal visitation to Defendant. Plaintiffs cross-appeal the Order's denial of Plaintiffs' claim Defendant be ordered to pay child support for Amber. In summary form, the undisputed evidence shows Amber was born out of wedlock on September 1993. Defendant is the mother of the child and William Stacy Speagle (the father), now deceased, was the biological father of the child. Plaintiffs are the biological parents of the father and, thus, the paternal grandparents of Amber. Defendant had sole custody of Amber from birth until 24 October 1995, when a court order was entered granting joint custody to Defendant and the father. During the time the father had custody of Amber, the father and child resided in Plaintiffs' home. On 29 January 1996, the father was killed by Bryce Colby Delon, a recent companion of Defendant. On 30 January 1996, Defendant was arrested and charged with first-degree murder and conspiracy to commit first-degree murder of the father. On that same day, Plaintiffs filed an action seeking custody of Amber, and an Emergency Order was immediately entered granting Amber's custody to Plaintiffs. Defendant remained in jail until 26 March 1996, after which she was released on bond, moved to Dallas, Texas, and became employed as an office receptionist. On 29 March 1996, Defendant filed an answer to Plaintiffs' complaint and counterclaimed for Amber's custody. On 29 June 1997, Defendant was

acquitted of all criminal charges arising from the father's death. On 19 August 1997, the trial court entered a temporary order maintaining Amber's custody with Plaintiffs and granting Defendant certain visitation privileges. With few exceptions, Defendant exercised her visitation privileges consistent with the 19 August 1997 order. Defendant was married to Robert Eric Seitz of Texas on 4 October 1997 and gave birth to his son on 15 June 1998. Defendant and her husband presently live in Texas. The evidence further shows Plaintiffs are of good character and reputation and have a stable home in Hickory, North Carolina. Amber is well adjusted and is currently enrolled in the Catawba County schools. There is a strong bond between Amber and Plaintiffs. Defendant, between Amber's birth and her arrest in 1996, was regularly employed as a topless dancer at various clubs and, on occasion, had sexual relations with different men. There is no evidence Defendant ever engaged in topless dancing or sexual relations in the presence of Amber. The trial court entered findings of fact consistent with this undisputed evidence and further found in part:

> 58. . . . Defendant's lifestyle and romantic involvement[]s resulted in her neglect and separation from the minor child.
> 59. . . . [T]hat any actions in the past but not recent past by . . . Defendant that may have been construed as inconsistent with the presumption that the biological parent will act always in the best interests of the child do not render . . . Defendant unfit to have a relationship with, but not custody of, her daughter.

The trial court then concluded, in part: "that at this time the best interests of the child would be served [by] granting custody to . . . Plaintiffs" and "Defendant is unfit to have custody of, but is a fit and proper person to be granted visitation with, the minor child."

The dispositive issue is whether the findings of fact and conclusions of law in this case justify the trial court's application of the best interests standard to adjudicate the custody dispute between a natural parent and the grandparents. In any child custody dispute between the parents and third parties, including grandparents, the parents have aconstitutionally protected interest in the companionship, custody, care, and control of their children. *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 530 (1997). The interest of the parents, therefore, prevails against the interest of third parties and precludes the application of a best interests standard, in resolving child custody disputes, unless the parents have engaged in some "conduct inconsistent with [their] protected status." Id. at 79, 484 S.E.2d at 534. This conduct includes, but is not limited to: neglect of the children; abandonment of the children; and, in some circumstances, the voluntary surrender of custody of the children. *Id.* Whether the conduct constitutes "conduct inconsistent" with the parents' protected status presents a question of law and, thus, is reviewable de novo, *Raynor v. Odom*, 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996); *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (any determination requiring the "exercise of judgment" is most properly classified a conclusion of

law), and "need not rise" to that conduct necessary to terminate parental rights, *Price*, 346 N.C. at 79, 484 S.E.2d at 534. The parental conduct must, however, in order to give rise to a best interests inquiry, have some negative impact on the child or constitute a substantial risk of such impact. *See Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 32 L. Ed. 2d 15, 35 (1972) (parents' constitutional right to rear their children can be suspended only when "it appears that parental decisions will jeopardize the health or safety of the child"); *cf. Browning v. Helff*, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000)(modification of child custody order permissible only upon showing of a change in circumstances "affecting the welfare of the child"); *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (neglect of child, within meaning of Juvenile Code, occurs only upon showing of lack of proper care accompanied with a showing that the lack of care resulted in "some physical, mental, or emotional impairment of the juvenile"); *In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 5 (1969) (adulterous conduct of parent does not per se render that parent unfit to have custody). In this case, the trial court clearly utilized a best interests inquiry. It concluded it was in the "best interests of the child" to grant custody to Plaintiffs, the child's grandparents. This was error. Even assuming Defendant's conduct between 3 September 1993 (Amber's birth) and 30 January 1996. (Defendant's arrest) is "inconsistent" with her

protected status,[1] there are no findings of fact or any evidence in the record this conduct had any negative impact on Amber or had a substantial risk of causing some harm to her. Accordingly, it was improper for the trial court to utilize the best interests standard to resolve this custody dispute, as Defendant has not lost her constitutionally protected right to retain custody of her child. The Order of the trial court must, therefore, be reversed. It, consequently, is unnecessary for us to address Plaintiffs' appeal or any other assignments of error.

Reversed.

Judges MARTIN and EDMUNDS concur.

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[1] Although the "conduct inconsistent" with the parents' protected constitutional right is not to be judged solely by the termination statutes, *Price*, 346 N.C. at 79, 484 S.E.2d at 534, the law with regard to termination of parental rights can, nonetheless, be instructive. That law holds that termination of parental rights cannot be based on past circumstances, which no longer exist, but must be based on grounds present at the time of the termination hearing. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). In this case, even assuming Defendant's topless dancing or sexual relations constitute "conduct inconsistent" with her protected parental status, within the meaning of Price, there is no evidence this conduct extended beyond 26 March 1996. Thus, there is no evidence Defendant was engaging in any "conduct inconsistent" with her protected status in August 1998, the date of the custody trial, or at any time soon before that trial. Furthermore, although Defendant was forced to leave her child when she was arrested and placed in custody, there is no evidence Defendant intended for this separation to be permanent and indeed Defendant sought to regain custody upon her release from jail. *See Price*, 346 N.C. at 83, 484 S.E.2d at 537 (parents' grant of temporary custody to another does not necessarily result in loss of protected status).

STATE OF NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NUMBER: 96CVD234

WILLIAM SPEAGLE, and wife
DERENE SPEAGLE
PLAINTIFFS,

-VS-

CHRISTY LYNETTE HOLLAND SEITZ
DEFENDANT,

ORDER AND JUDGMENT OF CUSTODY,
VISITATION AND CHILD SUPPORT
[Entered: March 19, 1999]

THIS CAUSE coming on to be heard and being heard before the undersigned William A. Creech, District Court Judge presiding at a Special Term of District Court, Civil Division, Domestic Relations of the General Court of Justice for Judicial District 25-B in Newton, Catawba County, North Carolina commencing on August 11, 1998 and ending on September 4, 1998. Plaintiffs were represented by J. Richardson Rudisill, Jr. Of Hickory, North Carolina and the Defendant was represented by Theodore F. Cummings, III of Hickory, North Carolina and Lisa Andrew Dubs of Hickory, North Carolina.

From the file, record and evidence presented, THE COURT MAKES THE FOLLOWING FINDINGS OF FACT:

1. That this action was commenced by the filing of a duly verified complaint and the issuance of a summons from the Office of the Clerk of Superior Court of Catawba County on January 30, 1996.

2. That at the time of commencement of this action, on January 30, 1996, both the Plaintiffs and the Defendant were citizens and residents of the State of North Carolina, Catawba County, and had been such for in excess of six (6) months.

3. That on January 30, 1996, Plaintiffs obtained a Ex-parte Emergency Order granting possession of the minor child Amber Ashton Holland, born September 3, 1993, and the verified Complaint and Emergency Order were served on the Defendant on February 6, 1996 while she was incarcerated in the Catawba County jail in Newton, North Carolina.

4. That through her attorney, the Defendant filed a duly verified answer on March 29, 1996.

5. That the Plaintiffs are the biological grandparents of the minor child Amber Ashton Holland, and the biological parents of the father of the minor child and each being approximately fifty (50) years of age.

6. That the Defendant is the biological mother of the minor child and being approximately twenty-four (24) years of age.

That the biological father of the minor child, William Stacy Speagle, is deceased, having died on January 29, 1996.

7. That the minor child, whose custody is in question, Amber Ashley Holland, was born September 3, 1993 and is now approximately five (5) years of age.

8. That the Defendant and the father of the minor child were never married to one another.

9. That from the time of her birth, the minor child was in the physical custody of her mother, the Defendant, until October 24, 1995, when a Temporary Order was entered by the Honorable Oliver L. Noble granting shared custody between the Defendant and the child's biological father.

10. That the Defendant and the minor child resided with the Plaintiffs and the father of the minor child from on or about October 1, 1993 until shortly after Christmas in December of 1993. That after the Defendant and the minor child moved out of the home of the Plaintiffs, the Plaintiffs continued to have contact with the minor child.

11. During the early part of 1994, the Defendant and the infant child resided with the Defendant's mother and step-father. During this period, Defendant denied that William Stacey Speagle was the biological father of Amber Ashton Holland, however, a paternity test confirmed that he was the biological father of the child.

12. That the Defendant subsequently moved into a rental dwelling in the Bethlehem Community of Alexander County where William Stacy Speagle and the Plaintiffs visited the infant child, Amber Aston Holland.

13. That during this period of time, Defendant was having some type of romantic affairs including sexual intercourse with men other than William Stacy Speagle.

14. That thereafter the Defendant moved to Raleigh, North Carolina on or about October of 1994. While there, the Defendant was employed as a topless dancer.

15. That the Defendant moved back to Hickory, North Carolina on or about March of 1995. That from October of 1994 to March of 1995, the Plaintiffs and the biological father of the minor child continued to have visitation with the minor child and during such visitation would participate in the care of the minor child.

16. That when the Defendant returned to Hickory, North Carolina she was employed as a topless dancer at Thee Dollhouse in Hickory, North Carolina.

17. That there were periods of time when the Defendant and the biological father of the minor child would reconcile. That further, during the summer of 1995 the parents of the minor child did in fact reconcile but later separated again during which time the Defendant did not allow William Stacy Speagle or the Plaintiffs to see the minor child.

18. That after the aforementioned separation, the biological father, William Stacy Speagle, filed two separate actions in Catawba County, to will An action for the custody of the minor child in Catawba County, File Number 95CVD2217; and an action Legitimating, Amber Ashton Holland, in Catawba County, File Number 95 SP 201.

19. The Defendant Christy Holland, moved, taking the minor child, Amber, to the Carolina Beach area of North Carolina.

20. That on October 24, 1995, the Honorable Oliver L. Noble entered a Temporary Order giving custody of the minor child to the mother on the second Sunday in each month through and including the next fourteen day period and to the biological father at all other times.

21. That during the period of 1993 and 1994, witnesses testified and the Court finds as a fact, that Defendant was dancing at an establishment in Hickory, North Carolina known as the "PSST" CLUB, later know as the TRIPLE A CLUB.

22. That Defendant was fired from the Triple A Club for violating their rules in that she ejaculated a male patron in front of the crowd.

23. That Defendant was working at "Thee Dollhouse" in August and September of 1995, and continued working at this establishment into December of 1995.

24. That while the biological father had custody of said minor child Amber, he resided with and maintained the child at the home of the Plaintiffs who assisted in caring for the minor child.

25. That from September of 1995, until November of 1995, the Defendant worked part-time as a topless dancer in Snead's Ferry, North Carolina, near the United States Marine Corp. Base at Camp Lejeune. During this period, the Defendant came to know and had a relationship with Bryce Colby Delon, a marine stationed at Camp Lejeune.

26. That according to the testimony of Lance Corporal Heath Mosely, who was the roommate of the Defendant's boyfriend, Bryce Colby Delon at Camp Lejeune, the reputation of both Defendant and her sister Brandy at the Marine Base, was that of "whores".

27. That on these weekends, both the Defendant and her sister, would usually spend the night in Room 316 of the United States' Marine barracks, being the room of Bryce Colby Delon and Heath Mosely, but did on occasions, spend the night with these two (2) Marines at the "Hostess House" located on the Marine Base where the Defendant engaged in sexual intercourse with Bryce Colby Delon and her sister Brandy Holland and engaged in sexual intercourse with Heath Mosely. In December 1995, the Defendant accompanied Mr. Delon to Dallas, Texas where she met his parents and also performed as a dancer at a Men's Club.

28. That on one occasion, the minor child, Amber, was seen by Lance Corporal Heath Mosely at the residence of the Defendant's mother, Ms. Geneva Gockel at Ms. Gockel's Carolina Beach residence, approximately an hour's drive from Snead's Ferry, at a time when Marine Bryce Colby Delon was also at Ms. Gockel's residence.

29. That during the period September of 1995, through December of 1995, while Defendant was in Hickory, she would leave the minor child, Amber, in the care of on Roberta Jewell while Defendant danced at Thee Dollhouse.

That Ms. Jewell had been apprised by the Catawba County Department of Social Services that she was maintaining too many children in her home at one time without a license.

That the Defendant would sometimes come by Ms. Jewell's house in the early morning hours at approximately 1:00 o'clock or 2:00 o'clock a.m., to take the minor child, Amber, to the Defendant's personal residence.

That other dancers also left their children in the care of Ms. Roberta Jewell during this period.

30. That a written Order was signed by the Honorable Clerk of Superior Court of Catawba County on December 27, 1995, which legitimated the child without changing the surname.

31. That on occasion the Defendant would visit Bryce Colby Delon in his barracks room or at the "Hostess House" located on the Marine Base. And in December 1995, Defendant accompanied Mr. Delon to Dallas, Texas where she met his parents and also performed as a dancer at a Men's Club.

32. That Heather Brown, friend of Defendant, testified that she, along with the Defendant, the minor child, Amber, and the minor child of Miss Brown, traveled to Morganton, North Carolina in December of 1995, to see a movie.

That Defendant stated, to Ms. Brown, that William Stacy Speagle would be dead by Christmas and it was taken care of.

33. That on January 18, 1996 the Defendant and the biological father of the minor child reconciled and began living together with the minor child in the home of the Defendant.

34. That on January 29, 1996 the biological father of the minor child was killed by Bryce Colby Delon, who on the same night committed suicide.

35. That on January 30, 1996, the Defendant was arrested and charged with the First-Degree Murder and Conspiracy to Commit Murder of William Stacy Speagle.

36. That pursuant to the Emergency Order entered ex-parte on the 30th day of January 1996, physical possession of the minor child, Amber, was given to the Plaintiffs.

37. That the Defendant remained incarcerated until March 26, 1996 at which time she was bonded out of jail. The funds for the purchase of her bond were provided by Robert Eric Scitz, a citizen and resident of Dallas, Texas whom the Defendant did not know prior to her incarceration.

38. That on March 29, 1996, the Defendant filed a duly verified Answer through her then attorney, John F. Cutchim, of Newton, North Carolina.

39. That on March 29, 1996 the Defendant filed a motion seeking Temporary Custody of the child, Amber.

40. That on April 30, 1996, the Honorable L. Oliver Noble, Jr., signed an order, which was filed may 2, 1996, staying further proceedings in the case until the earlier of either of the following:

> A. The completion of the trial of Christy Lynette Holland for her alleged part in the murder of William Stacy Speagle
>
> B. The Office of the District Attorney of the 25th Judicial District, the North Carolina State Bureau of Investigation and the Hickory Police Department deciding to share all information which Plaintiffs counsel considers adequate to present the case of the Plaintiff at a custody hearing.

41. That between January 30, 1996 and August of 1997, the minor child resided with the Plaintiffs and their other son Scott Speagle. During this period of time, numerous cards and notes were sent by the Defendant to the minor child, Amber, in care of the Plaintiffs herein and that Plaintiff, Derene Speagle, read one of these cards and showed some of the drawings on one card to the minor child. That further, Defendant made attempts to contact the minor child but was not allowed to speak to the child until she was allowed visitation in August, 1997 pursuant to a Court Order entered on July 18, 1997. That Plaintiff, William Speagle, testified that from the time of the entry of the Temporary Order on January 30, 1996 until the Court Ordered visitation in August of 1997, the Defendant's name was never mentioned to the minor child nor was the Defendant ever discussed with the minor child. That for a period of approximately twenty months, the minor child had no contact with the Defendant.

42. That shortly after being released from jail, the Defendant traveled to Dallas, Texas to stay with her sister, Brandie Renee Holland, and eventually established her own residence in Dallas, Texas. Subsequently, the Defendant became employed as a receptionist with the Scitz Group, Inc. of Dallas, Texas.

43. That after a six (6) week trial, the Defendant, on June 29, 1997, was acquitted of the charges of First Degree Murder and Conspiracy to Commit Murder of William Stacy Speagle.

44. That Defendant through her attorney, Lisa Andrew Dubs, filed a Motion, dated July 9, 1997 verified by the Defendant, seeking the care, custody, control and supervision of the minor child, Amber Ashton Holland, and seeking an Immediate Order removing the child from the Plaintiffs and placing the child with the Defendant.

45. That on July 10, 1997, defendant, through her then attorneys, C. Randall Isenhour and Lisa Andrew Dubs, filed another Motion seeking, among other relief, that the Ex-Parte Order which had been submitted to the Honorable Nancy L. Einstein on July 10, 1997 be treated as a Motion for an immediate Order and that a hearing be set on July 15, 1997 in the District Court of Catawba County.

46. That the Defendants Motions came on before the Honorable Jonathan L. Jones who ordered that the Motions were to be heard on July 18, 1997 and that the presentation of evidence was restricted to one hour for each the Plaintiff and the Defendant. That after such hearing Judge Jones Ordered that the minor child, Amber, was to remain in the temporary custody of the Plaintiffs and set a visitation schedule, which was to commence on August 20, 1997.

47. That the visitation schedule took place pursuant to the schedule set by Judge Jones except for the first period of visitation, visitation on December 12, 1997 and visitation scheduled around the birth of the Defendant's second child.

48. On October 4, 1997 the Defendant married Robert Eric Seitz. Further on June 15, 1998 the Defendant gave birth to a son, Chandler, the half brother of the minor child, Amber, and the son of Robert Eric Seitz.

49. That between October of 1997, and the latter stages of the Defendants pregnancy, she and Eric Seitz regularly flew from Dallas, Texas, or other locations to Charlotte, North Carolina and came to Hickory, North Carolina, an approximate one (1) hour drive away, by motor vehicle. That during this period of time, they expended in excess of thirty thousand dollars in travel expenses.

50. That the Defendant made two payments to the Plaintiffs of child support, one on April 30, 1997, in the amount of three thousand, five hundred, eighty-seven dollars ($3,587.00) and another consisting of two money orders, totaling one thousand, four hundred dollars ($1,400.00), dated January 20, 1998 neither of which were negotiated or returned to the Defendant.

51. That Mr. Springler, a certified public accountant, employed by Mr. Seitz testified that Mr. Seitz was well capable of providing financial security for the Defendant, his child and the minor child, Amber. Further, shortly before the commencement of this trial, Mr. Seitz had paid off a Federal Tax Lien in the approximate amount of one hundred, eighteen thousand dollars ($118,000.00) and was subject to a Judgment from South Trust Bank of Florida in excess of two hundred fifty thousand dollars

($250,000.00) which judgment and lien were to be paid within ninety days of his testimony and from the proceeds from the sale of property, owned by Mr. Seitz, in Amarillo, Texas.

52. That the Plaintiffs presented ample testimony of their love for the minor child and their ability to continue to provide for the care and upbringing of the minor child.

53. That the Plaintiffs are of good character and reputation and have a stable home life and live, with the minor child Amber, in a spacious, well kept, and comfortable home in Hickory, North Carolina.

54. The minor child is well adjusted and is currently enrolled in Kindergarten at St. Stephens Elementary School, in Catawba County, North Carolina.

55. That shortly after the minor child began visitation with the Defendant, the Plaintiffs sought professional assistance from Dr. James Powell, Child Psychologist, of Statesville, North Carolina, to assist the minor child.

56. That Dr. Powell testified that there was a strong bond between the minor child and the Plaintiff, Derene Speagle.

57. That the court finds that since birth of the child, through and including January 30, 1996, and continuing until the present, there has been a close and loving relationship between the Plaintiffs and the minor child and that the continuation of this relationship is necessary to protect the best interest and welfare of the minor child.

58. That the court finds that the Defendant's lifestyle and romantic involvement's resulted in her neglect and separation from the minor child.

59. The Court finds that any actions in the past but not recent past by the Defendant that may have been construed as inconsistent with the presumption that the biological parent will act always in the best interests of the child do not render the Defendant unfit to have a relationship with, but not custody of, her daughter.

NOW THEREFORE, BASED UPON THE FOREGOING FINDINGS OF FACTS, THE COURT CONCLUDES AS A MATTER OF LAW AS FOLLOWS:

1. That the Court has jurisdiction over the parties and the subject matter hereto.

2. That all pending issues are properly before the court.

3. That the Plaintiffs are fit and proper persons to be granted the care, custody, control, and supervision of the minor child, Amber Ashton Holland, and that at this time the best interests of the child would be served thereby granting custody to the Plaintiffs.

4. That the Defendant is unfit to have custody of, but is a fit and proper person to be granted visitation with, the minor child, Amber Ashton Holland; and, the best interests of the child thereby would be served by granting liberal visitation to the Defendant.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Custody of the minor child, Amber Ashton Holland, is granted to the Plaintiffs subject to the following "visitation" rights and privileges granted to Defendant.

A. Defendant shall have visitation privileges with the minor child at least once a month in accordance with a schedule to be agreed upon by the Plaintiffs and the Defendant. In the absence of a schedule voluntarily agreed upon by the Plaintiffs and the Defendant then Defendant shall have visitation as follows.

1. Visitation shall take place during the minor child's school Fall Break commencing at 4:00 p.m. on the day preceding and ending at 8:00 p.m. on the date it ends on even years.

2. Visitation shall take place during the Thanksgiving Holidays commencing at 4:00 p.m. on the day preceding and ending 8:00 p.m. on the afternoon or early evening of the next Sunday on uneven years.

3. Visitation shall take place during Christmas vacation commencing 4:00 p.m. on the preceding day and ending 4:00 p.m. on December 26th on even years and from December 26 until 8:00 p.m. the day before school resumes on uneven years.

4. Visitation shall take place during the Martin Luther King Holiday commencing the Friday before the observance at 4:00 p.m. and ending on the holiday at 8:00 p.m. on uneven years.

5. Visitation shall take place during school Spring Break commencing on the preceding day it begins at 4:00 p.m. and ending on the last day at 8:00 p.m. on even years.

6. Visitation shall take place during Easter Break commencing on the preceding day at 4:00 p.m. and ending on the last day at 8:00 p.m. on uneven years.

7. Visitation shall take place for school summer vacation commencing one week from the last day of classes at 4:00 p.m. and continuing for a period of four weeks and ending at 8:00 p.m. on the last day.

8. Visitation for the school year 1999-2000 and subsequent years shall follow the schedule of the Catawba County School system.

9. The Defendant shall have visitation with the minor child on Mother's Day each year. Said visitation to begin 4:00 p.m. on Friday and continue through Sunday at 8:00 p.m.

B. The Provisions for "visitation" may be modified or adjusted by mutual agreement of the parties, and any other "visitation" which is agreed upon by the parties is permitted. Any reasonable request by a party for custodial time or visitation shall not be unreasonable denied or withheld, given the circumstances at the time of the request. Each party shall yield custody to the other on special occasions such as family gatherings, reunions, deaths, weddings, or serious illnesses.

2. The Defendant shall be responsible for arranging the transportation the minor child to Charlotte Douglas Airport, one hour prior to the scheduled flight departure on the dates she is to travel to Dallas, Texas for visitation and for her return to the Defendant's home when she returns from Dallas, Texas to Charlotte, North Carolina. The minor child may be picked up,

delivered and travel with a responsible adult known to be so by either the Plaintiffs and or the Defendant in the event the Defendant is unable to personally travel to and from North Carolina. The Defendant will notify the Plaintiffs in advance of who will travel with the child during visitation in the event the Defendant is not the person traveling with the child. Both parties will allow for time exceptions due to travel problems. The party experiencing the problem will use due diligence in contacting the other party about any scheduling problems.

3. The parties shall not use or possess any alcoholic beverage, illegal drug, controlled substance, drug paraphernalia, sexually explicit material, or dangerous harmful, illegal material in the presence of the child. The parties shall not be impaired at anytime in the presence of the child and shall not permit the child to be in the presence of anyone who uses or possesses any of the materials named above, or to be in the presence of anyone who is impaired by any substance. The custodial party is responsible for the supervision of the child in the use of any potentially dangerous toys, vehicles or devices, such as motorcycles, go carts, or electrical appliances. The parties shall not allow the child to play or use any device that is inappropriate or dangerous considering the age and skill of the child.

The parties shall keep all weapons or dangerous equipment safely stored away from the child and shall not allow the child to use or possess a handgun or firearm, except when in

the physical presence and under the direct supervision and control of a responsible adult familiar with the use and safety of firearms.

4. The parties shall not use or permit anyone else to use or subject the child to the use of any profane, obscene, indecent, derogatory, or unkind language, particularly with reference to another party, their relatives, acquaintances, or friends. The parties shall not stalk, harass, intimidate, threaten, assault, or molest the child, each other, another party, or relative or acquaintance of a party, and neither the Plaintiffs or the Defendant shall not question the child about the activities of the other.

A. The parties shall not use the child to deliver or communicate any message to another party.

B. Neither party will discuss, with the child, the trial or the death of the father of the child or any past circumstances and activities of the parties.

5. The parties shall not engage in sexual activity while having custody or care of the child, except with their respective spouse, and out of the presence of the child.

A. The parties shall not sleep with or occupy a bed with another person to whom they are not married while having custody or care of the child.

6. The child will be returned promptly after each visit.

7. The child may be taken for vacations beyond the boundaries of the State of North Carolina if the other party is given the specific address and location of the child, a phone number where the child can be contacted, and the approximate time and date of arrival and return of the child. Further, said location shall be given to the other party in advance so that reservations or the proposed location of the child can be confirmed. It is anticipated in this Order that the child will be allowed to travel to the home of the Defendant in Dallas, Texas during the regular visitation.

8. All terms of this Order are enforceable pursuant to the contempt powers of the Court set forth in North Carolina General Statues, Chapter 5A, in addition to any other remedy available at law or in equity. This document shall serve as the Order of the Court. The provisions of this Order are effective immediately, and this Order is entered as Judgment for all intents and purposes pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, N.C.G.S. 1A on the date written below.

9. That violation of the terms of this Order shall result in punishment as for Contempt in addition to any and all other appropriate remedies at law or in equity.

10. That by and with the consent of both counsel for the Defendant and counsel for the Plaintiffs, this Order may be signed out of term, out of session, and out of County.

Announced in open Court September 4, 1998, and signed this 19th day of March 1999.

/s/_____
Honorable William A. Creech
District Court Judge Presiding,
by Special Commission Of
the Administrative Office of the Courts

* * *

Creech, what Amber would be if you would tear from the heartstrings of that child her bond with the Speagles and give her to this woman. You can predict what she'll be if you leave her with the Speagles.

THE COURT: Thank you, Mr. Rudisill. Now, I am—I know that this case has been delayed for a considerable time and I'm certain that the litigants are anxious to have a decision in this matter and I shall be back with counsel as quickly as possible. I want to read the brief and I have been going over my notes during the days that we were not here and reviewing cases and so I don't feel that I have an awful lot that I need to do to render a decision, but I shall be back in touch with counsel as quickly as possible. And I would just like to admonish everyone the same admonition I gave to you yesterday, that we're dealing with a very precious commodity, this child. And that I would hope that the love that these litigants have for that child will in some way enable them to transcind any personal animosity that may exist between them. And having said that, we'll recess this Court. So we stand in recess.

(Court stood in recess.)

THE COURT: Well, I'd like to say to counsel that I very much appreciate the representation that each of you has made in this case. I know this has been a very difficult case for everyone concerned and I appreciate the great deal of work that each of you has done. It's very obvious from the presentations you made, and I want to thank you very much for all the courtesies that you extended to the Court, especially to me, during this time.

Now, as the judgment of this Court, and before saying it, I just want to reiterate what Senator Ervin said a half century ago when he was a Justice of the North Carolina Supreme Court, that the law is realistic and certainly takes into consideration the fact that there are changes, changes of conditions, changes of fortune in general, and society. And while we're making a judicial award of custody today, that only determines the rights of the parties at this time. It's not permanent. And, of course, it may be modified by the Court in the future as there are events and the welfare of the child require modification. But it's the judgment of the Court that the custody of the child, Amber Ashton Holland, should remain with the grandparents who are the plaintiffs in this action.

The Court does want to provide in the order that there will be liberal visitation with the mother. And I would hope that counsel could discuss this and would discuss it with their clients. And if there's any possibility that the clients, among themselves, could agree to a visitation schedule, then I would prefer that. And I realize that this has been a period of estrangement. And I hope, by negotiating more or less directly with each other, that we can bring about some type of reproachment. Because it certainly is not in the best interest of this child to have this estrangement, and so I 'm very much concerned about that.

If there is no agreement among the parties, then I have taken the liberty of taking one of your order forms that are used here, I understand, rather perfunctorily, and I have designated the periods of time that I think would be appropriate, which I shall provide for if they can't work out something otherwise. And I would simply provide that the plaintiffs are to

have primary custody, but the defendant is to have liberal visitation. And by that I mean that -we'll talk about weekends that will begin at 6:00 on Friday and continue until 6:00 on the following Sunday. And I would provide that the holidays be divided, that Thanksgiving—For instance, I've indicated the times for Thanksgiving, the times for Christmas. I've provided for a week at Christmas. I have provided that she will have four weeks visitation with her mother during the summer. I have provided that she may leave this jurisdiction for these visitations, and that the defendant, the mother, will give the primary custodians 30-days' notice of the four weeks that she intends to exercise visitation. And some things that I didn't address because I wasn't certain, about a spring break. And I presume counsel will address that and work something out if there is to be a spring break. I would provide for the Easter visitation also being every other year unless it is a situation that we can divide it and if there's spring break at that time. But I'm not familiar with your local customs, so I will leave that up to counsel to work that out. Certainly, on the parent's birthday, the child should have that time with her mother, if at all possible. I don't recall exactly when the mother's birthday is. The birthday of the child, I would certainly provide for some visitation if it can come on a weekend or if it would come at a time it can be divided. I want these things to be reasonable. And I want you to look through the—through this order form that I have seen that you use here, and I am going to provide other reasonable visitation.

And I don't see any reason to provide that there would be any third parties involved in exchanges of the child. I think it's time for these people to get

together, have direct communication. And I expect them to cooperate with each other, to be polite and courteous to each other at all times. And I expect that, in every instance, they will see that this child is provided a salubrious environment. By that, I mean not only legally correct, but morally correct, and that no one who is involved with the care of this child would be involved in any type of harmful, dangerous, or impairing substances, and that no disparaging remarks of any kind will be tolerated. I want them to be very certain about that, that they - I don't want this child to hear anything discussed about the parent's background or anything of that sort. It's unfortunate that the child probably has already heard some things. But in any event, I think that with regard to the order, I don't want any reference made to any assassination or anything of that sort, simply the death of the father. I don't care about making this an affrontare to anyone. I want this - Hopefully, we can start a procedure here that will make things a little bit more amenable for all the parties involved. I realize there are some doubts about that in view of the other considerations. But I want to provide a course that the child would be promptly picked up and returned.

Now, I recognize that the mother is going to be—presumably is going to be living in Texas, and I would hope that we could work out some accommodation. It would seem to me, because the child is getting older that especially when there is to be extended visitation, it may be, the way they do things now at the airport, that the child, in a year or so, can fly herself without being accompanied. I don't know. Airlines have various and sundry arrangements.

But I do want to be certain that there is no finding that the defendant is unfit for custody. The fact that there have been conditions in the past, but not in the recent past, which might have been construed as being inconsistent with the presumption that the biological parent will always act in the best interest of the child. I think those things are not in the recent past and I do not want any finding that she is unfit for custody.

Now, having said those things to you, I would like to leave counsel with the opportunity to discuss with their clients what the Court has provided for. And hopefully you can come up with an order that will not in any way be an affrontare to either one of them, taking into consideration that I'm certain that these cases always are difficult for people to accommodate when there's been such bitterness in the past. But I look forward to hearing from counsel. And I shall be in Charlotte next week and I will be able to communicate with you by telephone. And if you have anything ready by the first of the week, which I'm not suggesting that you have to do it that quickly, but I will be there after Labor Day. I'll be in Charlotte the rest of the week.

MR. RUDISILL: With your permission, I will fax it

* * *

No. 32PA01 TWENTY-FIVE-B DISTRICT
SUPREME COURT OF NORTH CAROLINA

****

(Speagle v. Seitz)

William Speagle, and wife, Derene Speagle
v
Christy Lynette Holland Seitz

From NC Court of Appeals
(COA99-1526)
From Catawba
(96CVD234)

****

ORDER

Upon consideration of the petition filed by Defendant for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 31st day of January 2002.

Edmunds, J. Recused.

s/ Butterfield, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 4th day of February 2002.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

/s/ Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Court Reporter
Mr. Forrest A. Ferrell, Attorney at Law, For Speagle
Mr. Stephen L. Palmer, Attorney at Law, For Speagle
Mr. Robert B. Long, Jr., Attorney at Law, For Spaegles
Mr. Thomas K. Maher, Attorney at Law, For Seitz
Mr. M. Gordon Widenhouse, Attorney at Law for Speitz
West Publishing Company
Lexis-Nexis

IN THE SUPREME COURT OF NORTH CAROLINA

32PA01 (Speagle v Seitz) Catwaba

William Speagle, and wife, Derene Speagle

v

Christy Lynette Holland Seitz

NC Court of Appeals
(COA99-1536)
Catwaba
(96CVD234)

JUDGMENT
[Entered January 7, 2002]

This cause came to be argued upon the transcript of the record from the North Carolina Court of Appeals. Upon consideration whereof, this Court is of the opinion that there is error in the record of said Court of Appeals.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable I. Beverly Lake, Jr., Chief Justice, be certified to the said North Carolina Court of Appeals to the intent that the judgment of the Court of Appeals is Reversed.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Two-Hundred forty-seven and 25/100 dollars ($247.25), and execution issue therefor.

Certified to the North Carolina Court of Appeals, this the 7th day of January 2002.

A TRUE COPY

CHRISTIE SPEIR CAMERON
Clerk, Supreme Court of
North Carolina

by: /s/ _____
Assistant Clerk